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**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| B.I.P. CORPORATION,<br><br>Plaintiff,<br><br>vs.<br><br>MITEC TELECOM, INC., AND DOES 1 TO 30,<br><br>Defendant. | Case No. 08 CV 0313 H (CAB)<br><br>**DEFENDANT MITEC TELECOM, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**<br><br>Date: August 11, 2008<br>Time: 10:30 a.m.<br>Place: Courtroom 13<br><br>Complaint Filed: January 18, 2008<br>Trial Date: None Set |

# I. INTRODUCTION

In its opposing papers, Plaintiff repeats a number of times the general principle that motions to dismiss are disfavored, and seems to argue, largely on that basis, that this Motion should be denied. The simple fact remains, however, that while motions to dismiss pursuant to Rule 12(b)(6) may not be encouraged generally, they are very appropriate, and should be granted, where "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 732 (9th Cir. 1987). As detailed below and in Mitec's moving papers, Plaintiff's Second Amended Complaint does not pass muster under this standard, and this Motion should be granted.

Specifically, in at least four of its five causes of action, Plaintiff bases its claims on purported written agreements without attaching those agreements as exhibits or quoting them in full or setting forth their full content. Plaintiff contends that these allegations are sufficient, but they plainly are not; Plaintiff sets forth only very general allegations as to what Mitec or other parties may have agreed to, without specifying in any detail the substance of the full agreements or what their full import was intended to be. For this reason, Plaintiff's First Cause of Action, for misappropriation of trade secrets, Third Cause of Action, for intentional interference with prospective economic relations, Fourth Cause of Action, for breach of the covenant of good faith and fair dealing, and Fifth Cause of Action, for breach of contract, all fail.

Additionally, the First Cause of Action simply does not properly allege the existence of a trade secret; the alleged efforts Plaintiff made to develop its customer list and then maintain its confidentiality do not rise to the level necessary to demonstrate why or how that information should be protected as a trade secret. Finally, in its Second Cause of Action, for fraud and deceit, Plaintiff sets forth a lengthy list of supposed false representations made by Mitec's representatives that, in their totality, are nothing more than statements about the future and the hoped-for result that the products delivered to Plaintiff would be free of defects. Contrary to Plaintiff's contention in its opposing papers, this argument is not "irrational," but a plain and true summary of what Plaintiff alleges Mitec's representatives said. What would be truly "irrational" would be to permit Plaintiff to turn a defective products claim into a fraud action.

For these reasons, Mitec's Motion should be granted, and Plaintiff's Second Amended Complaint should be dismissed.

## II. ARGUMENT

### A. Plaintiff's First Cause Of Action For Misappropriation Of Trade Secrets, And Third Cause Of Action, For Interference With Prospective Economic Advantage, Fail To State Valid Causes Of Action.

Again, to state a cause of action for misappropriation of trade secrets under the Uniform Trade Secrets Act ("UTSA"), plaintiff must plead two primary elements: (1) the existence of a trade secret, and (2) misappropriation of the trade secret. *See* Cal. Civ. Code § 3426.1(b). Plaintiff insists that it has alleged these elements in its Second Amended Complaint, but it very clearly has not.

As noted in Mitec's moving papers, Plaintiff's Second Amended Complaint attempts to cure the plain deficiencies of its previous pleading by alleging two written agreements, including one purported non-disclosure agreement with Mitec, and asserting that it entered into confidentiality agreements with its employees and others. Unfortunately for Plaintiff, these additional allegations are not good enough. First, the purported written agreements are not attached as exhibits, and are described only in the most bare-bones fashion. Plaintiff insists that "bare-bones" allegations are sufficient (Opposing papers, at p. 4), but Mitec is still entitled, at a minimum, to have the making of the agreement and the substance of its relevant terms alleged (*see Perry v. Robertson*, 201 Cal.App.3d 333, 341 (1988)), and Plaintiff does not do that here.

Specifically, the description of the purported non-disclosure agreement of June 2, 2005 only sets forth very general allegations as to what Mitec may have agreed to, without specifying in any detail the substance of the full agreement or what its full import was intended to be. And the mere allegation that Plaintiff entered into confidentiality agreements with its employees and others simply is not enough, without more, to demonstrate that Plaintiff's "customer list" was a trade secret. There is no description of what those purported agreements consisted of, or of what the parties actually agreed to. Under these circumstances, Plaintiff yet again fails to describe how, if at all, it ensured that its employees or anyone else would not disclose or provide the customer list to others.

In its opposing papers, Plaintiff insists, at some length, that the allegations of the purported contracts are sufficient (Opposing papers, at pp. 4-5), but upon close inspection they simply do not stand up. Again, none of the allegations concerning any of the purported written agreements consist of any substance of what Mitec or any other party purportedly agreed to do or not do, basic elements that Mitec is entitled to know and that an actionable claim must state. Because Plaintiff has failed yet again to allege the existence of a trade secret, any misappropriation is not actionable, and Plaintiff's first cause of action should be dismissed.

For the same reasons, Plaintiff's Third Cause of Action, for interference with prospective economic relations, also should be dismissed. The entire factual basis for the claim rests on the purported nondisclosure agreement described in the cause of action for misappropriation of trade secrets, and that because that cause of action fails, Plaintiff's interference cause of action fails as well.

**B. Plaintiff's Second Cause Of Action For Fraud And Deceit Fails To State A Valid Cause Of Action.**

In its opposing papers, Plaintiff insists that the allegations concerning fraud are sufficient. In sum, it claims that the substance of the purported nondisclosure agreement is adequately alleged, and that the statements allegedly made by Mitec representatives concerning the product to be shipped to Plaintiff were representations of fact, not opinions. (Opposing papers, at pp. 6-7.) On the contrary, the allegations do not satisfy basic pleading requirements.

First, Plaintiff's fraud claim is based on representations allegedly made by Mitec in the purported June 2, 2005 written non-disclosure agreement, and as detailed above and in Mitec's moving papers, that alleged agreement is not a sufficient basis for any claim, including this fraud claim. Plaintiff contends that it has pled the facts of the purported agreement with sufficient particularity, but what the substance of the agreement, and what Mitec allegedly agreed to do or not to do, is not set forth in sufficient context for Mitec to know what facts it must defend against.

And as for the alleged representations concerning the quality of the product, they were nothing more than the opinion of the Mitec personnel concerning the product and concerning what would happen in the future, i.e., that any defects had been and would be remedied. Plaintiff insists that Mitec's characterization of these statements is "irrational," and claims that they could be nothing other than representations of fact. (Opposing papers, at p. 7.) This argument deliberately misperceives the substance of the alleged statements. Mitec's representatives simply stated their opinion about the product, and their opinion as to what would happen *in the future*. Again, Plaintiff is trying to turn a defective products claim into a fraud action. *That* result would be truly "irrational," and this Court should dismiss this cause of action.

**C. Plaintiff's Fourth Cause Of Action, For Breach Of Covenant Of Good Faith And Fair Dealing. And Its Fifth Cause Of Action, For Breach Of Contract, Fail To State Valid Causes Of Action.**

In its opposing papers, Plaintiff contends that the two purported written agreements, the alleged June 2, 2005 non-disclosure agreement, and the purported July 26, 2006 "bill and hold" agreement, are described with sufficient specificity for Plaintiff's Fourth Cause of Action, for breach of the implied covenant of good faith and fair dealing, and its Fifth Cause of Action, for breach of contract, to survive. (Opposing papers, at pp. 7-8.) One wonders what complaint Plaintiff has been reading.

Specifically, and again, the description of the purported non-disclosure agreement of June 2, 2005 only sets forth very general allegations as to what Mitec may have agreed to, without specifying in any detail the substance of the full agreement or what its full import was intended to be. The same defects are present in the description of the "bill and hold" agreement; again, the description only sets forth in a general way the particulars of what Mitec agreed to do with respect to delivering product to Plaintiff and with respect to the quality of the product delivered.

Plaintiff protests that any effort to "specify in detail the full substance of the full agreement" would be "clearly impractical as it would be too time consuming to describe in detail the entire agreement and would mean that plaintiff would necessarily have to attach a copy of such agreement in each and every instance." (Opposing papers, at pp. 7-8.) This remarkable statement ignores both the common practice of attaching to pleadings and incorporating by reference written agreements and the purpose for which that practice has become common: to avoid the very difficulty we have encountered with Plaintiff's Second Amended Complaint, where written agreements are described in inadequate detail and the parties being sued on those agreements consequently do not know the substance of the claims against them. Both of these causes of action fail for this reason, and should be dismissed.

## III. CONCLUSION

Throughout its opposing papers, Plaintiff insists that motions to dismiss under Rule 12(b)(6) are disfavored and that in almost all cases they should be denied. Mitec does not dispute that, in most cases, the pleading stage should be of limited duration and the parties should move on to litigate the action. But in cases like this, where the pleading is plainly inadequate, and where Plaintiff has had multiple opportunities to get it right but has not, a motion to dismiss serves a critically useful office. Indeed, in one of the cases Plaintiff cites, *Allarcom Pay Television, Ltd. v. General Instrument Corp.* 69 F.3d 381 (9th Cir. 1995), the Ninth Circuit noted that in reviewing a dismissal for failure to state a claim it limits its review "to the contents of the complaint and assume[s] that all the allegations of material fact are true" (69 F.3d at 385), but the Court then proceeded to affirm the dismissal of Federal Communications Act claims against two defendants. (69 F.3d at 385-386.) The Court thus recognized that in appropriate cases, such motions should be granted. That plainly is the case here. Accordingly, for the reasons set forth above and in Mitec's moving papers, Mitec respectfully requests that the Court grant its motion to dismiss Plaintiff's Second Amended Complaint.

Dated: August 1, 2008

CALL, JENSEN & FERRELL
A Professional Corporation
SCOTT J. FERRELL
DAVID R. SUGDEN

By: */s/ David R. Sugden*
DAVID R. SUGDEN

Attorneys for Defendant Mitec Telecom, Inc.

# CERTIFICATE OF SERVICE
(United States District Court)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 610 Newport Center Drive, Suite 700, Newport Beach, CA 92660.

On August 1, 2008, I served the foregoing document described as **DEFENDANT MITEC TELECOM, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** on the following person(s) in the manner(s) indicated below:

**SEE ATTACHED SERVICE LIST**

[ X ] (BY ELECTRONIC SERVICE) I am causing the document(s) to be served on the Filing User(s) through the Court's Electronic Filing System.

[ ] (BY MAIL) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

[ ] (BY OVERNIGHT SERVICE) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by the overnight service provider the same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by the overnight service provider with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by the overnight service provider at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

[ ] (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the transmittal sheet, I transmitted from a facsimile transmission machine, which telephone number is (949) 717-3100, the document described above and a copy of this declaration to the person, and at the facsimile transmission telephone numbers, set forth herein. The above-described transmission was reported as complete and without error by a properly issued transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission.

[ ] (BY E-MAIL) I transmitted the foregoing document(s) by e-mail to the addressee(s) at the e-mail address(s) indicated.

**[ X ]** (FEDERAL) I declare that I am a member of the Bar and a registered Filing User for this District of the United States District Court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Certificate is executed on August 1, 2008, at Newport Beach, California.

*/s/ David R. Sugden*

David R. Sugden

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